Filed 5/4/10 P. v. Hardy CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

STACY A. HARDY,

Defendant and Appellant.

F058184

(Super. Ct. No. BF123603A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Kenneth C. Twisselman II, Judge.

Robert D. Bacon, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Wanda Hill Rouzan, Deputy Attorneys General, for Plaintiff and Respondent.

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After a 14-year old boy was sexually assaulted, the police investigation led to the arrest of defendant, Stacy A. Hardy, who was charged with the following three criminal counts: forcible sexual penetration in violation of Penal Code[1] section 289, subdivision (a)(1) (count 1); forcible oral copulation in violation of section 288a, subdivision (c)(2) (count 2); and lewd and lascivious acts with a minor child in violation of section 288, subdivision (c)(1) (count 3). The evidence at trial included the victim's testimony about what defendant did to him, the victim's identification of defendant and substantial DNA evidence confirming that defendant was the perpetrator. During closing argument, the prosecutor inadvertently displayed a PowerPoint[2] slide that included a reference to defendant's parole status. It was on the screen for several seconds before the prosecutor noticed his error and clicked to the next frame. The prosecutor did not mention defendant's parole status to the jury. Nevertheless, based on the fact that the jury potentially saw defendant's parole status on the screen, defendant moved for a mistrial. The trial court denied the motion, but admonished the jury to rely only on the evidence introduced at trial. The jury found defendant guilty as charged on all three counts. At sentencing, the trial court imposed the upper terms on counts 1 and 2 and determined that they would be served consecutively. Defendant appealed, contending the trial court prejudicially abused its discretion in failing to grant the motion for a mistrial and in imposing consecutive sentences on counts 1 and 2. We disagree and affirm the judgment of the trial court in its entirety.

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1 Unless otherwise indicated, all further statutory references are to the Penal Code.

2 PowerPoint is a computer software presentation program that is used to display frames (or slides) of text or images onto a screen. The slides are advanced using a remote control device. As the parties referred to the program by its product or brand name, for convenience we do the same.

FACTS AND PROCEDURAL HISTORY

On June 21, 2007, J.R., a 14-year old boy, was in downtown Bakersfield visiting friends and spending time at a street fair and a skateboard park. Sometime after sunset, around 8:00 or 9:00 p.m., he began to walk to where his sister was at a play rehearsal so that he could get a ride home with her.

While J.R. was walking in the direction of his ride home, a 40-year old African-American male, 5 feet 11 inches tall, with a shaved head, later identified as defendant, suddenly approached J.R. and started walking next to him. At that time, J.R. was only 5 feet 3 inches tall and weighed 130 pounds. Defendant struck up a conversation with J.R. and seemed friendly at first.

As they walked, they came to a location near the railroad tracks, enclosed by a high wall and out of sight of the roadway. At this point, defendant turned to J.R. and asked if he wanted to smoke a marijuana cigarette. When J.R. refused, defendant became angry, accused J.R. of being a cop and said that he "shoots cops." J.R. was scared so he took a puff of the marijuana cigarette and tried to assure defendant that he was not a cop. Defendant grabbed J.R.'s arm, pulled out an object he stated was a gun,[3] and said he was going to check J.R. for wires. Defendant threw the boy on the ground, landed on him and held him down. He took the cell phone out of J.R.'s pocket and turned it off. Defendant then pulled down J.R.'s pants and underwear and put the boy's penis in his mouth several times. Defendant also put his finger in J.R.'s anus several times as he continued to orally copulate the minor victim.

Defendant also choked J.R. almost to the point of unconsciousness and tried to kiss J.R. on the mouth several times. Defendant told J.R. that if he did what defendant wanted, he would not get hurt (including the words, "if you pleasure me you won't get

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[3] The man stated he had a gun, but J.R. never got a good look at the object, so it is not certain that it was actually a gun.

hurt"), but if J.R. did not do what he wanted, defendant would kill him. J.R. thought he was going to die for sure, since he did not think that defendant would leave a witness alive. At one point, J.R. wrestled free and was able to get to his feet. Defendant told J.R. that if he ran, defendant would shoot him in the back. When J.R. hesitated, defendant grabbed him, threw him back on the ground and announced, "Now we are going to get shit started."

Defendant then began to untie J.R.'s shoes and take them off, telling J.R. that he needed to get an erection. While defendant was removing J.R.'s shoes, J.R. found a brick lying near him and was able to grab it and hide it behind his head. The next time defendant came close to J.R.'s face to try and kiss him, J.R. reached for the brick and threw it at defendant's forehead. The brick struck defendant's forehead and the impact made a loud noise. Defendant was stunned and fell back, holding his head. J.R. got up, swung at defendant a few times, kicked him between the legs, and then ran as fast as he could.

J.R. ran down the railroad tracks until he found a place where he could climb over the 10-foot wall. As soon as he got over the wall, he desperately looked for help. J.R. saw a woman standing outside her home. Since he was only wearing a shirt, he assured the woman that he was not crazy, but that he had been sexually assaulted. The woman went inside her house and brought him some shorts and a cordless phone. J.R. called his mother and told her he had just been raped. J.R.'s father drove to pick him up at the woman's house.

After J.R.'s father arrived, the two of them drove back to the crime scene to find defendant and make sure he did not get away. They were unable to find defendant, but they did retrieve some of J.R.'s articles of clothing at the crime scene. J.R. and his father then drove to the Bakersfield police station, but the station was closed, so they went home. They arrived home at about midnight, and J.R.'s father called the police and

reported that his son had been assaulted. J.R. attempted to take a shower, but it was so painful that he got out after about five seconds.

Officer Guinn of the Bakersfield Police Department came to the house the next day.[4] When he learned that a sexual assault had occurred, he transported the victim, J.R., to the nearest hospital for a sexual assault examination. He also collected J.R.'s pants, shirt, socks and shoes and bagged them as evidence. Officer Guinn and J.R.'s father went to the crime scene while J.R. was at the hospital, and Officer Guinn found a brick that matched the description from J.R., the marijuana cigarette, a hat, two sets of earphones, and J.R.'s underwear. The items of evidence were handled by Officer Guinn with latex gloves on, placed in separate bags, stapled in an evidence bag and booked into evidence in the Bakersfield Police Department property room. Officer Guinn acknowledged that the separate bags containing items of evidence did not have tape seals.

Detective Montellano of the Bakersfield Police Department showed J.R. a six-man photograph lineup on June 23, 2007, and another on August 28, 2007. On both occasions, J.R. could not identify anyone in the photographs. Detective Montellano had J.R.'s sexual assault examination kit and other items of evidence sent to the lab in hopes of finding DNA evidence to identify a suspect. Results returned from the lab showed DNA from a source other than the victim's. On February 4, 2008, the lab technician ran the unknown source through a national database, and the search resulted in a "hit" or a match identifying one particular individual—namely, defendant.

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[4] Officer Guinn would have responded sooner, but the investigation was initially given a lower priority because the victim's father had not specifically mentioned that it had been a sexual assault.

A search warrant was issued to obtain a DNA sample from defendant. Detective Montellano served the search warrant on defendant and obtained a sample of his DNA.[5] Defendant's known DNA from the sample matched the unknown source of DNA found on evidence retrieved from the crime scene, including the marijuana cigarette, a pair of headphones, the blood on J.R.'s shirt, and J.R.'s penile swab (obtained in his sexual assault examination). For example, the DNA found on J.R.'s penile swab included that of two male individuals: J.R. was the major contributor for obvious reasons (the swab was taken from his penis), and defendant's DNA correlated with the minor contributor. The DNA expert testified that the probability of the DNA mixture found on the penile swab being from J.R. and defendant was 1.6 quadrillion times more likely than the mixture being from J.R. and some other unknown or unrelated individual in the African-American population.[6]

J.R. was shown a third six-man photograph lineup on February 19, 2008, which this time included a photograph of defendant. J.R. positively identified defendant, adding that he was about "sixty percent" certain. At trial, J.R. again positively identified defendant as the person who sexually assaulted him.

In the course of his closing argument, the prosecutor made use of a PowerPoint device as a part of his presentation, thereby displaying on a 42-inch screen to the left of the jury box a summary outline of his argument in written form and various photographic exhibits that had been presented to the jury during the trial. At one point, while the prosecutor was summarizing the police investigation, the prosecutor caused a PowerPoint slide containing several bullet points to appear on the screen. In the second line of the

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5 This procedure was followed to be sure there was a complete DNA sample, with all the "15 markers" that make up a DNA profile, for comparison to the evidence in the case.

6 J.R. testified that the perpetrator was African-American.

first bullet point, a reference was made to the fact that defendant was on parole. The prosecutor noticed the error and quickly advanced to the next screen. At no time did the prosecutor orally express to the jury that defendant was on parole. The slide referring to defendant's parole status had been on the screen for approximately five to 10 seconds. When defendant's counsel realized what had been displayed on the screen, he objected and asked for a sidebar conference. The closing argument was broken off, and the judge sent the jury out of the courtroom to allow a hearing of defendant's motion for mistrial.

The trial court heard extensive argument from both sides. The prosecutor explained that the mistake was inadvertent. The slide had been prepared five weeks prior to closing argument, and the day before oral argument the prosecutor had gone through all the slides to remove any matters not in evidence, but he overlooked the reference to defendant's parole status. The prosecutor argued that the matter could be cured by means of an admonition to the jury. Defense counsel argued the error was highly prejudicial and the bell could not be "unrung"; therefore, a mistrial should be granted. The trial court denied the motion for mistrial, reasoning that an admonition to the jury would be sufficient to cure the error, and that no prejudice was apparent because the case would likely be resolved on the basis of the DNA evidence, which was the strongest evidence in the case.

When the jury was brought back in, the trial court instructed and admonished the jury that "the statements of the attorneys are not evidence," whether such statements were made during trial, during oral argument, or as depictions of words on the PowerPoint screen. The trial court stressed, "You are to rely only upon the evidence that was properly presented here in the courtroom in deciding what the facts are in this case." More specifically, the trial court told the jury: "I will also admonish you that any depictions on this PowerPoint presentation that [the prosecutor] is using in connection with his closing argument, none of that is evidence. And there have been different words depicted.… That's not evidence. You are going to rely only upon the evidence

presented. [¶] … You are not going to rely upon [the prosecutor's] PowerPoint presentation. The jury is to rely only on evidence properly presented here in the courtroom in deciding what the facts are. [¶] And [I am] also reminding you of one of the instructions I have already given to you that the jury must not discuss facts as to which there is no evidence."[7]

After the conclusion of closing arguments, the jury was instructed and began its deliberations. On June 4, 2009, the jury found defendant guilty of all three counts, which were as follows: count 1, forcible sexual penetration (§ 289, subd. (a)(1)); count 2, forcible oral copulation (§ 288a, subd. (c)(2)); and count 3, lewd and lascivious acts with a minor child (§ 288, subd. (c)(1)). In a bifurcated hearing, the trial court found all allegations of prior felonies and prison terms to be true.

Sentencing was held on July 17, 2009. On count 1, defendant was sentenced to the upper term of 16 years. On count 2, he was also sentenced to the upper term of 16 years, fully consecutive to count 1 pursuant to section 667.6, subdivision (c). On count 3, a term of 6 years was stayed pursuant to section 654. After applicable enhancements were added, defendant's aggregate prison sentence was 41 years. Defendant's timely notice of appeal followed.

DISCUSSION

I. Motion for Mistrial

Defendant contends the trial court abused its discretion in failing to grant his motion for a mistrial. Not so. A trial court should grant a mistrial only if "a party's chances of receiving a fair trial have been irreparably damaged" (*People v. Bolden* (2002) 29 Cal.4th 515, 555), that is, if the trial court is apprised of "'prejudice that it judges

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[7] The trial court intentionally did not mention the word "parole" in the admonishment, so as to avoid any further emphasis being given to it and because some of the jurors may not have noticed the slide's reference to parole.

incurable by admonition or instruction.' [Citation.]" (*People v. Avila* (2006) 38 Cal.4th 491, 573.)

"We review the denial of a motion for mistrial under the deferential abuse of discretion standard. [Citations.] 'A motion for mistrial is directed to the sound discretion of the trial court.… "Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions."' [Citation.]" (*People v. Cox* (2003) 30 Cal.4th 916, 953.)

In evaluating whether the trial court abused its discretion in denying the mistrial motion, "[w]e presume the jury followed the court's instructions." (*People v. Avila*, *supra*, 38 Cal.4th at p. 574.) "It is only in the exceptional case that 'the improper subject matter is of such a character that its effect … cannot be removed by the court's admonitions.'" (*People v. Allen* (1978) 77 Cal.App.3d 924, 935.)

Here, assuming the jury noticed the reference to defendant's parole status on the subject PowerPoint slide during the five to 10 seconds that it appeared on the screen, the trial court promptly intervened and gave strong admonitions to the jury that an attorney's words are not evidence, including the prosecutor's words that had appeared on the PowerPoint screen, and that the jury must rely only on evidence that was presented during the trial. We see no reason to conclude that the jury would not have followed these admonitions.[8] "In the absence of evidence to the contrary, we presume the jury heeded the admonition." (*People v. Burgener* (2003) 29 Cal.4th 833, 874.) The prosecutor did not draw attention to or speak of defendant's parole status in his oral

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[8] We note that *before* closing arguments began, the trial court informed the jury that "you have heard all the evidence," and reminded the jury that all questions of fact must be decided based on the evidence that had been presented in the trial, and it further reminded the jury that statements made by the attorneys during closing argument are not evidence. Thus, the incident was framed with such admonitions before and after it occurred.

argument, and the trial court's admonition did not specifically refer to it, thereby avoiding emphasis being given to the inadvertently displayed reference to parole. We conclude the momentary appearance of the words on the screen was, in light of the trial court's prompt and strong admonition, a matter that a reasonable juror would have disregarded.

Moreover, in view of the convincing strength of the DNA evidence in this case, together with J.R.'s identification of defendant, we conclude defendant has failed to show that any prejudice, much less prejudice incurable by admonition, resulted from the incident. (*People v. Harris* (1994) 22 Cal.App.4th 1575, 1581 [witness's reference to the defendant's parole status did not cause prejudice warranting a mistrial where evidence of guilt was strong]; see *People v. Jordan* (2003) 108 Cal.App.4th 349, 364 [brief mention of the defendant's parole status in a police report submitted to jury did not cause prejudice since evidence of guilt was strong; therefore, motion for new trial was properly denied]; *People v. Cox*, *supra*, 30 Cal.4th at p. 952 [no prejudice shown as to isolated reference to polygraph test in otherwise well-conducted trial where trial court admonished jury; therefore, mistrial motion was properly denied].) The trial court was plainly correct when it observed at the time of the mistrial motion that the outcome of this case would turn on the compelling nature of the DNA evidence, not on any notion of defendant's parole status. We conclude that the trial court was well within its discretion when it denied defendant's motion for mistrial.

II. Fully Consecutive Sentences

Defendant contends the trial court abused its discretion by imposing full-term, consecutive sentences on counts 1 and 2 under section 667.6, subdivision (c). Specifically, defendant asserts the trial court (1) overlooked the preliminary step of deciding whether or not to impose consecutive sentences, and (2) failed to give an adequate factual basis for imposing full-term, consecutive sentences. We disagree.

"""It is well settled that in making sentencing choices pursuant to section 667.6, subdivision (c), sexual assault offenses, the trial court must state a reason for imposing a consecutive sentence and a separate reason for imposing a full consecutive sentence as opposed to one-third the middle term as provided in section 1170.1." [Citation.] … [H]owever, the court may "repeat the same reasons." (Cal. Rules of Court, rule 426(b)[, now rule 4.426(b)].)' [Citation.] 'What is required is an identification of the criteria which justify use of the drastically harsher provisions of section 667.6, subdivision (c). The crucial factor, in our view, is that the record reflect recognition on the part of the trial court that it is making a separate and additional choice in sentencing under section 667.6, subdivision (c).' [Citation.] In making this determination, '[t]he sentencing judge is to be guided by the criteria listed in rule 4.425, which incorporates rules 4.421 [(aggravating circumstances)] and 4.423[(mitigating circumstances)], as well as any other reasonably related criteria as provided in rule 4.408 [(enumerated criteria not exclusive)].' (Cal. Rules of Court, rule 4.426(b).)" (*People v. Quintanilla* (2009) 170 Cal.App.4th 406, 411.)

Here, the trial court understood the distinction between the decision to apply consecutive sentences and the decision to apply an upper-term, consecutive sentence. The trial judge expressly acknowledged the requirement that "a decision to impose a fully consecutive sentence under Section 667.6[,] Subdivision (c) is an additional sentence choice that requires a statement of reasons separate from those given for consecutive sentences but which may repeat the same reasons."

Contrary to defendant's first argument, the record adequately reflects that the trial court engaged in the preliminary step of deciding the issue of whether to impose consecutive sentences. In this regard, the trial court engaged in a process of weighing factors in mitigation and aggravation. The trial court found there were no circumstances in mitigation, but there were numerous circumstances in aggravation, including (1) defendant's numerous prior adult convictions and sustained petitions in juvenile

proceedings; (2) defendant's active parole status when the present crimes were committed; (3) defendant's unsatisfactory performance on probation due to subsequent violations; and (4) defendant's actions showing he is a danger to society. After having stated these reasons, the trial court proceeded to its consideration of whether to impose full-term sentences consecutively, but in the course of doing so clarified: "I have *already* stated my rationale for justifying consecutive sentences." (Italics added.) Although the discussion of the two sentencing choices overlapped, the record indicates that the trial court not only understood the need to make a separate decision that consecutive sentences should be imposed, but it actually did so.

Defendant's second argument is that the trial court's rationale for imposing full-term, consecutive sentences does not comport with the facts. The trial court held that because counts 1 and 2 involved "separate acts of violence" it was appropriate to impose fully consecutive sentences.[9] Defendant argues that there was only *one* act of violence or threat of violence in this case, even though two different kinds of unlawful sexual contact nay have occurred.

We disagree and conclude the trial court properly exercised its sentencing discretion. Section 667.6, subdivision (c), gives the trial court discretion to impose "a full, separate, and consecutive term" for "*each* violation of an offense specified in subdivision (e) if the crimes involve the same victim on the same occasion." (Italics added.) In counts 1 and 2, defendant was convicted of violating two of the sexual offenses listed in subdivision (e) of the statute—that is, oral copulation and sexual (anal) penetration. Therefore, the trial court had discretion to impose the fully consecutive sentences.

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9 Although this was the critical and decisive factor relied on by the trial court, the manner in which the trial court expressed its sentencing findings indicates the trial court *also* took into account the factors previously stated for consecutive sentencing.

The trial court was required to state its reason or reasons justifying the sentencing decision. (*People v. Quintanilla*, *supra*, 170 Cal.App.4th at p. 411.) Here, as noted, the critical factor relied on by the trial court was that defendant's crimes of oral copulation and sexual penetration were separate acts of violence. (See Cal. Rules of Court, rule 4.425(a)(2) [listing as a proper criterion that "[t]he crimes involved separate acts of violence or threats of violence"]; Cal. Rules of Court, rule 4.426(b).) We believe the trial court was warranted in reaching that conclusion under the facts of this case. The crimes for which defendant was convicted in counts 1 and 2 are distinct sexual offenses that, in this case, were committed by means of violence and threat of violence. One crime was not contingent on the other; each constituted a distinct, physical violation of the victim, accomplished through use of force, violence and threat. Moreover, the testimony at trial showed that defendant committed multiple acts of oral copulation and anal penetration and, in doing so and attempting to do more, engaged in multiple acts of violence and threats of violence. The violence included throwing J.R. to the ground twice, choking him, and threatening his life several times, including a gun threat. We find there was an adequate factual basis to support the trial court's conclusion that there were separate acts of violence. Accordingly, the trial court did not err by imposing fully consecutive terms.

DISPOSITION

The judgment is affirmed.

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Kane, J.

WE CONCUR:

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Cornell, Acting P.J.

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Gomes, J.